



STATE OF WASHINGTON

DEPARTMENT OF AGRICULTURE

P.O. Box 42560 • Olympia, Washington 98504-2560 • (360) 902-1800

June 5, 2006

TO: Affected Blueberry Producers and Interested Parties

FROM: Deborah Axelson, Commodity Commission Coordinator  
*Deborah Axelson*

RE: **Final Decision – Petition to Amend the Washington Blueberry Commission Marketing Order (Chapter 16-550 WAC)**

Enclosed you will find the Director's Findings, Conclusion, and Final Decision on the petition filed by the Washington Blueberry Commission to amend the Blueberry Marketing Order, WAC 16-550. Here is a table of contents for your use when reviewing the decision.

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The Director's Final Decision is to conduct a referendum on the proposed amendments to the Marketing Order. A ballot on the proposal will be mailed to all blueberry producers on the list of affected producers on or about June 30, 2006. Based on RCW 15.65.140 and 15.65.160, the percentages to pass a referendum on amendments to a Marketing Order are:

1. *Of those producers eligible to vote, at least 65 percent by number and at least 51 percent by volume of production must vote "yes"; OR*
2. *Of those producers eligible to vote, at least 51 percent by number and at least 65 percent by volume of production must vote "yes"; OR*
3. *Of those voting, 60 percent or more by number and 60 percent or more by volume of production must vote "yes".*

If the referendum results approve the proposal, the proposal will be adopted on or about August 14, 2006 and will become effected September 14, 2006. If the referendum results defeat the proposal, no further action will be taken on the petition.

The Director will count the votes from those affected producers listed on the List of Affected Producers, as maintained by the Commission, to determine whether the referendum has passed. Under RCW 15.65.295, affected producers have the responsibility to ensure that their correct address and production information for the last three years is filed with the Commission. If you have a change of address or wish to confirm the information on file with the Commission, please contact the Washington Blueberry Commission, 15903 Bow Hill Road, Bow, Washington 98232, (360) 766-6150 as soon as possible.

Enclosure: Final Decision

**BEFORE THE DIRECTOR OF THE  
WASHINGTON STATE DEPARTMENT OF AGRICULTURE**

**Proposal to Amend the Washington Blueberry  
Commission Marketing Order (WAC 16-550)** )  
\_\_\_\_\_ )

**Findings, Conclusion, and  
FINAL DECISION**

**INTRODUCTION**

This document is a summary of the proposal to amend the Washington Blueberry Commission Marketing Order. It contains background information on the need for the amendments, summarizes the process that has been followed, recaps the testimony at the public hearing, lists the Director's findings, and recommends the proposal be sent to a referendum of Blueberry producers.

**BACKGROUND AND TECHNICAL REPORT**

On June 25, 2001, the U.S. Supreme Court issued a decision that called into question the ability of a Commodity Commission that is established and operated in the way most of Washington's Commodity Commissions are, to continue to engage in their usual activities and to require producers to pay assessments for generic advertising and promotion.

In the case of *United Foods, Inc. vs. United States*, the U.S. Supreme Court held that the mandatory assessment to fund a generic advertising program under the Mushroom Promotion, Research, and Consumer Information Act was a violation of the First Amendment because it required producers to pay for a message that they may not agree with. This decision was a shock to agriculture across the country as it had been assumed that the funding of generic promotions with mandatory assessments was settled four years earlier when the Court rejected a First Amendment challenge to a similar program in *Glickman vs. Wileman Bros. & Elliott, Inc.* In *Glickman vs. Wileman*, the Court rejected the First Amendment argument by saying that the advertising program in question was constitutional because it was part of a comprehensive scheme of regulation for the agricultural commodities.

While the 2001 Supreme Court decision only applied to the national Mushroom Council's advertising program, the Court's ruling raised questions about its potential impact on other state and federal marketing orders carrying out similar activities. Since the *United Foods* decision, a number of state and federal marketing orders around the country have been challenged on First Amendment grounds.

On March 31, 2003, the Federal District Court for the Eastern District of Washington (Judge Ed Shea) ruled that the mandatory Apple Commission assessments are unconstitutional because they violate the First Amendment. In essence, the Court ruled that certain apple growers were being required to pay for a message that they do not agree with.

The Apple Commission argued that it should not be subject to challenge under the First Amendment because the commission is part of the state government and is entitled to "government speech" protections because it speaks the message of Washington government with regard to the positive qualities of Washington apples. But the Court disagreed.

In reviewing the court rulings, the Director of Agriculture and the current Commodity Commissions determined it would be in the best interests of Washington's agricultural producers and industries, our rural communities, the state's economy, and the citizens of the state for Commodity Commissions to continue to exist in Washington. Based on the ruling against the Apple Commission, the Commodity Commission laws, RCW 15.65 and 15.66, needed to be amended.

Amendments to the Commodity Commission laws were modeled in response to the *United Foods* decision, the *Wileman* decision, the Apple Commission decision, and a decision involving the Federal Beef Act. The Federal Beef Act withstood a First Amendment challenge in a federal district court case in this circuit because the court determined that the National Beef Board was speaking on behalf of the government when it promoted beef and beef products.

Government is free to speak without being subject to First Amendment challenges. Legislation was written in 2002 and 2003 to increase Department of Agriculture oversight of Commodity Commissions to strengthen the position that Washington's Commodity Commissions are entitled to government speech protection because they speak the message of Washington government with regard to their particular commodity, and to update the statutes. The Washington Legislature passed the amendments. The amendments to the Commodity Commission laws:

1. Clarify the intent of the legislature in authorizing and establishing Commodity Commissions and including them in the existing comprehensive regulatory scheme of agriculture.
2. Expand a Commodity Commission's potential purposes for existing (*such as to be involved in commodity related matters such as irrigation, processing, transportation, handling, or assist with pest control, etc.*).
3. Affirm that Washington Commodity Commissions have the authority, with oversight by the Director, to speak on behalf of Washington state government on commodity and commodity-related issues (*i.e. promotion, marketing, education*).
4. Provide for the appointment of a majority of Commodity Commission board members by the Director of Agriculture.
5. Provide that the Director of Agriculture is a voting member of a Commission board.
6. Authorize the Director to review and approve a Commission's budget, project, and program.
7. Reiterate the importance of the Commission's role for the state of Washington.
8. Update and clarify various provisions of RCW 15.65 and 15.66, including those relating to issuing, amending, and terminating a Marketing Order and record keeping.
9. Authorize Commodity Commissions to take on additional powers and duties, if they choose to.

Current Commodity Commission Marketing Orders no longer match the law they were adopted under. Therefore, proposed amendments to the WA Blueberry Commission's Marketing Order will bring it in line with the Commodity Commission laws. The proposed changes will also add

additional powers and duties that the Commission believes will be of benefit to its industry and Washington's rural communities. The proposed amendments will restructure the Commission so that it can speak on behalf of Washington state government and will implement administrative changes.

The specific amendments to the Marketing Order are shown in Attachment "A."

### **PROCEDURAL STEPS**

This matter came before the Director of the Washington State Department of Agriculture (WSDA) pursuant to a petition filed by the Washington Blueberry Commission requesting amendments to the Commission's Marketing Order (WAC 16-550) under the authority set forth in RCW 15.65, Washington State Agricultural Commodity Boards Act.

On February 14, 2006, WSDA filed with the Washington State Code Reviser a Notice of Proposed Rulemaking (CR-102) requesting comments on the proposed Marketing Order amendments. The notice was published in the *Washington State Register* on March 7, 2006 (WSR #06-05-097).

Also, on March 7, 2007, a notice about the petition to amend the Marketing Order and notice of the public hearing on the proposed amendments was mailed to affected Blueberry producers and interested parties. A Notice of Public Hearing was published in the Bellingham Herald on March 7 and 8, 2006 and the Columbian on March 8 and 9, 2006

Pursuant to RCW 15.65.070, a public hearing was held on March 30, 2006, beginning at 1:00 p.m. at the WSU Research & Extension Center, Allmendinger Center, 7612 Pioneer Ave. E., Puyallup, WA. Written comments on the proposal were accepted through the close of business (5:00 p.m.) on March 30, 2006.

### **TESTIMONY ON AMENDMENTS**

Under RCW 15.65.070 through 15.65.170 and RCW 34.05, Administrative Procedure Act, the Department collected testimony to determine whether affected producers or interested parties supported the proposed amendments to the Washington Blueberry Commission Marketing Order.

Supporters of the proposed amendments provided the following comments:

WSDA received no comments opposed to the proposed amendments.

A total of three individuals signed in at the hearing. Out of those three, no person provided oral testimony. WSDA received no written testimony on the proposed amendments. A tally of the attendance at the hearing on the proposed amendments are as follows:

- Of the 3 individuals who signed in at the hearing and who did not provide testimony:
  - 3 supported the proposed amendments
  - 0 opposed the proposed amendments
  - 0 indicated no position
- No individuals provided oral testimony.

## **RECOMMENDED DECISION**

On April 20, 2006, The Director of WSDA issued the following Recommended Decision on the proposal:

The proposal to amend the Washington Blueberry Commission Marketing Order (WAC 16-550) will be sent to a referendum pursuant to RCW 15.65.160. A ballot will be mailed to all Blueberry producers on the list of affected producers.

If the referendum results approve the proposal, the proposal will be adopted on or about August 14, 2006 and the proposal will become effective September 14, 2006. If the referendum results defeat the proposal, no further action will be taken on the petition.

## **OBJECTIONS FILED WITH THE DIRECTOR**

Under RCW 15.65.110 all interested parties had from April 20, 2006 to May 10, 2006 to file objections or exceptions to the Recommended Decision with the Director. No objections were filed with the Director in opposition to the proposed Marketing Order amendments or the Recommended Decision.

## **FINDINGS AND CONCLUSION**

Based on the entire record, including facts, testimony, and evidence presented and received at the public hearing, any written comments that may have been received by WSDA, information relating to the 2002 and the 2003 amendments to chapter 15.65 RCW and matters of which the Director may take official notice under RCW 15.65.100, including the history and background of the Washington Blueberry Commission and the decisions and settlement agreement in *Washington State Apple Advertising Commission v. Jack Nickell Orchards, LLC, et al.*, the Director makes the following findings and conclusion:

1. The Washington Blueberry Commission was formed under a Marketing Order approved by a vote of the affected producers pursuant to the Washington State Agricultural Commodity Boards Act (Chapter 15.65 RCW) that became effective on June 15, 1969.
2. The Marketing Order establishing the Washington Blueberry Commission (WAC 16-550) currently provides the following purposes:

***WAC 16-550-030 Marketing order purposes.*** *The order is to promote the general welfare of the state, to enable producers of blueberries to help themselves establish orderly, fair, sound, efficient, unhampered marketing; facilitate cultural and harvesting improvements, and regulate unfair trade practices within the industry.*

*(1) To carry out the purposes of the order, the board may provide for a program in one or more of the following areas:*

*(a) Establish plans and conduct programs for advertising, sales, promotion and/or other programs for advertising, sales, promotion and/or other programs for maintaining present markets and/or creating new or larger markets for blueberries. Such programs shall be directed toward increasing the sale of blueberries without reference to any particular brand or trade name and shall neither make use of false or unwarranted claims in behalf of blueberries nor disparage the quality, value, sale or use of any other agricultural commodity.*

*(b) Provide for research in the production, processing and/or marketing of blueberries and expend the necessary funds for such purposes. Insofar as practicable, such research shall be carried on by*

*experiment stations of Washington State University, but if in the judgment of the board, said experiment stations do not have the facilities for a particular project or if some other research agency has better facilities therefor, the project may be carried out by other research agencies selected by the board.*

*(c) Provide by rules and regulations for:*

*(i) Establishing uniform labels and labeling requirements for blueberries or any products thereof, requiring producers, handlers and other persons to conform to standards for the placing of labels, trademarks, insignia or brands on containers or packages: Provided, That all licensed blueberry dealers and brokers are entitled to use on the face of their product any particular trademark, insignia, brand or label that they may now have or will have. That established brands, labels, trademarks or insignias may be properly used in selling or commercially disposing of blueberries and blueberry products or in offering the same for sale, advertising and/or delivering said blueberries or blueberry products;*

*(ii) Providing for inspection and enforcement to ascertain and effectuate compliance;*

*(iii) Establishing rules and regulations respecting the foregoing.*

*(d) The board may authorize use of any money received and of any persons employed thereunder for legal proceedings, of any type and in the name of any person, directed to enforcement of this or any other law in force in the state of Washington relating to the prevention of unfair trade practices.*

*(e) Provide for marketing information and services to affected producers, for the verification of grades, standards, weights, tests and sampling of quality and quantity of blueberries purchased by handlers from affected producers.*

3. Pursuant to RCW 15.65, the Washington Blueberry Commission filed a petition requesting amendments to the Commission's Marketing Order (WAC 16-550) on January 17, 2006.
4. Pursuant to RCW 15.65 and RCW 34.05, WSDA issued notices, held a hearing, and collected testimony to determine whether affected producers or interested parties supported the proposed amendments to the Washington Blueberry Commission Marketing Order.
5. Although only a small segment of the industry chose to attend and did not comment at the public hearing, the Director finds that the majority of those attending the hearing supported the proposed amendments to the Washington Blueberry Commission Marketing Order.
6. The Director finds that even though the proposed amendments take some of the power to directly run the Commission away from the Commission's board by giving oversight responsibilities to the Director, the current state of the law and the challenges to Commodity Commissions make it necessary to do so, so that the Commission can continue to engage in the full range of activities authorized in the Marketing Order.
7. The Director finds that it is appropriate to include the proposed amendments that are detailed in Attachment "A" in the proposal to amend the Marketing Order:
  - New Section WAC 16-550-005, Marketing Order for Washington blueberries -- Policy statement.
  - New Section WAC 16-550-006, Marketing Order purposes.
  - Amend WAC 16-550-010, Definitions.
  - Amend WAC 16-550-020, Blueberry commodity board.
  - Amend WAC 16-550-040, Assessments and collections.

- Amend WAC 16-550-060, Termination of order.
  - Repeal WAC 16-529-030, Marketing order purposes.
8. The Director finds that it is in the best interest of the Blueberry industry and the public interest that the Blueberry industry remains a viable agricultural industry in Washington State.
  9. The Director concludes that the evidence and the record support a finding that the proposed amendments effectuate the declared policies and purposes of RCW 15.65 and WAC 16-550.

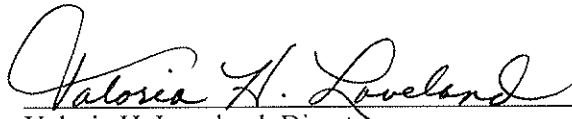
### **FINAL DECISION**

**NOW, THEREFORE,** based on the entire record in this matter, the Director enters the following Recommended Decision:

The proposal to amend the Washington Blueberry Commission Marketing Order (WAC 16-550) will be sent to a referendum pursuant to RCW 15.65.160. A ballot will be mailed to all Blueberry producers on the list of affected producers.

If the referendum results approve the proposal, the proposal will be adopted on or about August 14, 2006 and the proposal will become effective September 14, 2006. If the referendum results defeat the proposal, no further action will be taken on the petition.

**DATED** this 5th day of June 2006.

  
Valoria H. Loveland, Director  
Washington State Department of Agriculture



## ATTACHMENT A



## PROPOSED RULE MAKING

CR-102 (June 2004)

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

Agency: WA State Department of Agriculture

- ☐ Preproposal Statement of Inquiry was filed as WSR \_\_\_\_\_; or  
☐ Expedited Rule Making--Proposed notice was filed as WSR \_\_\_\_\_; or  
☐ Proposal is exempt under RCW 34.05.310(4).

- ☒ Original Notice  
☐ Supplemental Notice to WSR \_\_\_\_\_  
☐ Continuance of WSR \_\_\_\_\_

Title of rule and other identifying information: (Describe Subject) Washington Blueberry Commission Marketing Order - Chapter 16-550 WAC

## Hearing location(s):

WSU Research & Extension Center  
 Allmendinger Center  
 7612 Pioneer Way E.  
 Puyallup, WA

Date: March 30, 2006 Time: 1:00 p.m.

## Submit written comments to:

Name: Deborah Axelsson, Commodity Commission Coordinator  
 Address: WA State Dept. of Agriculture  
 PO Box 42560  
 Olympia, WA 98504

e-mail: [daxelsson@agr.wa.gov](mailto:daxelsson@agr.wa.gov)fax: (360) 902-2092 by (date): March 30, 2006 -- 5:00p.m.

## Assistance for persons with disabilities: Contact

Rochelle Painter at (360) 902-2060 by March 20, 2006.

TTY: (360) 902-1996

Date of intended adoption: August 14, 2006

(Note: This is NOT the effective date)

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:** During past legislative sessions, significant amendments were made to the Washington Blueberry Commission's enabling statute, RCW 15.65. These statutory changes prompted the proposed amendment to WAC 16-550. The proposed amendments expand the Commission's policy and purpose statements, update the definitions, update the commission member selection process, add additional power and duties to benefit the industry, update meeting and administrative procedures, and expand the Commission's information and education role. These proposed amendments are intended to achieve consistency with the statute, as well as, improve the readability and clarity of the Marketing Order. The following Marketing Order sections are affected by the proposed amendments:

- New Section WAC 16-550-005, Marketing order for Washington blueberries -- Policy statement.
- New Section WAC 16-550-006, Marketing order purposes.
- Amend WAC 16-550-010, Definitions.
- Amend WAC 16-550-020, Blueberry commodity board.
- Amend WAC 16-550-040, Assessments and collections.
- Amend WAC 16-550-060, Termination of order.
- Repeal WAC 16-529-030, Marketing order purposes.

**Reasons supporting proposal:** The proposed amendments are intended to make the Marketing Order consistent with the Commodity Commission enabling statute, RCW 15.65, and to implement the petition received from the Washington Blueberry Commission in accordance with RCW 15.65.050.

Statutory authority for adoption: RCW 15.65.047, 15.65.050 and chapter 34.05 RCW

Statute being implemented: Chapter 15.65 RCW

## Is rule necessary because of a:

Federal Law?

☐ Yes ☒ No

Federal Court Decision?

☐ Yes ☒ No

State Court Decision?

☐ Yes ☒ No

If yes, CITATION:

## DATE

February 14, 2006

## NAME (type or print)

William E. Brookreson

## SIGNATURE

## TITLE

Deputy Director

## CODE REVISER USE ONLY

16-550  
 06-05-097

(COMPLETE REVERSE SIDE)

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:

Any rule proposal that results from this rulemaking process will not be adopted unless the proposed rules are also approved in a referendum of affected blueberry producers conducted pursuant to RCW 15.65.

Name of proponent: (person or organization) Washington Blueberry Commission

☐ Private  
☐ Public  
☒ Governmental

Name of agency personnel responsible for:

Name	Office Location	Phone
Drafting..... Deborah Axelson	Olympia, WA	(360) 902-1802
Implementation.... WA Blueberry Commission and Department of Agriculture	Bow, WA Olympia, WA	(360) 766-6150 (360) 902-1802
Enforcement..... Same as above.	Same as above.	Same as above.

Has a small business economic impact statement been prepared under chapter 19.85 RCW?

☐ Yes. Attach copy of small business economic impact statement.

A copy of the statement may be obtained by contacting:

Name:  
Address:

phone ( ) \_\_\_\_\_  
fax ( ) \_\_\_\_\_  
e-mail \_\_\_\_\_

☒ No. Explain why no statement was prepared.

Any adoption of amendments to WAC 16-550 would ultimately be determined by a referendum vote of the affected parties. A formal small business economic impact statement under RCW 19.85 is not required because of the exemption granted in RCW 15.65.570(2).

Is a cost-benefit analysis required under RCW 34.05.328?

☐ Yes A preliminary cost-benefit analysis may be obtained by contacting:

Name:  
Address:

phone ( ) \_\_\_\_\_  
fax ( ) \_\_\_\_\_  
e-mail \_\_\_\_\_

☒ No: Please explain: The Department of Agriculture and the Washington Blueberry Commission are not named agencies in RCW 34.05.328(5)(a)(i).

NEW SECTION

WAC 16-550-005 Marketing order for Washington blueberries--  
Policy statement. (1) The marketing of blueberries within this state is in the public interest. It is vital to the continued economic well-being of the citizens of this state and their general welfare that its blueberries be properly promoted by:

(a) Enabling producers of blueberries to help themselves in establishing orderly, fair, sound, efficient, and unhampered marketing, grading, and standardizing of the blueberries they produce; and

(b) Working towards stabilizing the agricultural industry by increasing consumption of blueberries within the state, the nation, and internationally.

(2) That it is in the overriding public interest that support for the blueberry industry be clearly expressed, that adequate protection be given to the industry and its activities and operations, and that blueberries be promoted individually and as part of a comprehensive agricultural industry to:

(a) Enhance the reputation and image of Washington state's blueberries.

(b) Increase the sale and use of Washington state's blueberries in local, domestic, and foreign markets.

(c) Protect the public by educating the public in reference to the quality, care, and methods used in the production of Washington state's blueberries.

(d) Increase the knowledge of the health-giving qualities and dietetic value of Washington state's blueberries and products.

(e) Support and engage in programs or activities that benefit the planting, production, harvesting, handling, processing, marketing, and uses of blueberries produced in Washington state.

(3) The director is authorized to implement, administer, and enforce chapter 15.65 RCW through the adoption of this marketing order.

(4) The Washington state blueberry commodity board exists primarily for the benefit of the people of the state of Washington and its economy, and with oversight by the director, the board is authorized to speak on behalf of Washington state government with regard to blueberries under the provisions of this marketing order.

## NEW SECTION

WAC 16-550-006 Marketing order purposes. This marketing order is to promote the general welfare of the state and for the purpose of maintaining existing markets or creating new or larger local, domestic, and foreign markets; or increasing production efficiency, ensuring a fair regulatory environment; or increasing per capita consumption of blueberries in Washington state. The Washington state blueberry commodity board is designated by the director to conduct the following programs in accordance with chapter 15.65 RCW:

(1) To carry out the purposes of the order, the board may provide for a program in one or more of the following areas:

(a) Establish plans and conduct programs for marketing, sales, promotion and/or other programs for advertising, sales, promotion and/or other programs for maintaining present markets and/or creating new or larger markets for blueberries. Such programs shall be directed toward increasing the sale of blueberries without reference to any particular brand or trade name and shall neither make use of false or unwarranted claims in behalf of blueberries nor disparage the quality, value, sale or use of any other agricultural commodity. The board may also engage in cooperative efforts in the domestic or foreign marketing of blueberries.

(b) Provide for research in the production, processing, irrigation, transportation, handling, and/or marketing of blueberries and expend the necessary funds for such purposes. Insofar as practicable, research shall be carried on by experiment stations of Washington State University, but, if in the judgment of the board, said experiment stations do not have the facilities for a particular project or if some other research agency has better facilities therefor, the project may be carried out by other research agencies selected by the board.

(c) Provide by rules for:

(i) Establishing uniform labels and labeling requirements for blueberries or any products thereof, requiring producers, handlers and other persons to conform to standards for the placing of labels, trademarks, insignia or brands on containers or packages: Provided, That all licensed blueberry dealers and brokers are entitled to use on the face of their product any particular trademark, insignia, brand or label that they may now have or will have. That established brands, labels, trademarks or insignias may be properly used in selling or commercially disposing of blueberries and blueberry products or in offering the same for sale, advertising and/or delivering said blueberries or blueberry products;

(ii) Providing for inspection and enforcement to ascertain and effectuate compliance.

(d) The board may authorize use of any money received and of any persons employed thereunder for legal proceedings, of any type and in the name of any person, directed to enforcement of this or any other law in force in the state of Washington relating to the prevention of unfair trade practices.

(e) Conduct programs for the purpose of providing information and education including:

(i) Marketing information and services for producers of blueberries for the verification of grades, standards, weights, tests, and sampling of quality and quantity of blueberries purchased by handlers from affected producers.

(ii) Information and services enabling producers to meet their resource conservation objectives.

(iii) Blueberry-related education and training.

(f) Subject to the provisions of the act, provide information and communicate on matters pertaining to the production, irrigation, processing, transportation, marketing, or uses of blueberries produced in Washington state to any elected official or officer or employee of any agency.

(2) The director shall approve any plans, programs, and projects concerning:

(a) The establishment, issuance, effectuation, and administration of programs authorized under this section for advertising and promotion of blueberries.

(b) The establishment and effectuation of market research projects, market development projects, or both to the end that marketing and utilization of the affected commodity may be encouraged, expanded, improved, or made more efficient.

AMENDATORY SECTION (Amending Order 2068, filed 12/13/90, effective 1/13/91)

WAC 16-550-010 Definitions of terms. Definitions for terms used in this chapter are also found in chapter 15.65 RCW, Washington State Agricultural Commodity Boards Act. For the purpose of this marketing order, the following additional definitions shall apply:

(1) "Director" means the director of agriculture of the state of Washington or his or her duly appointed representative.

(2) "Department" means the department of agriculture of the state of Washington.

(3) "Act" means the Washington State Agricultural (~~Enabling Act of 1961~~) Commodity Boards Act or chapter 15.65 RCW.

(4) "Person" means any (~~(person)~~) individual, firm, ((association or)) corporation, limited liability company, trust, association, partnership, society or any other organization of individuals, or any unit or agency of local or state government.

(5) "Affected producer" or "producer" means any person who produces blueberries in commercial quantities in the state of Washington, or who sells or stores blueberries in the state of Washington for fresh market or for processing. "To produce" means to act as a producer. For the purposes of the blueberry marketing order, "producer" shall include bailees who contract to produce or

grow any agricultural product on behalf of a bailor who retains title to the seed and its resulting agricultural product or the agricultural product delivered for further production or increase.

(6) "Commercial quantity" means any blueberries produced, or stored, for a market by a producer in any calendar year.

(7) "Handler" means any person who acts as principal or agent or otherwise in processing, selling, marketing, storing, or distributing blueberries not produced by him/her. "Handler" does not include a common carrier used to transport an agricultural commodity. "To handle" means to act as a handler.

(8) "Blueberry commodity board" hereinafter referred to as "board" or "commission" means the commodity board formed under the provisions of WAC 16-550-020 of this blueberry order.

(9) "Blueberries" means and includes all kinds, varieties, and hybrids of "vaccinium corym bosum" and "vaccinium australe" grown and marketed in the state of Washington.

(10) "Marketing season" or "fiscal year" means the twelve-month period beginning ~~((with July))~~ January 1 ~~((of any year))~~ and ending ~~((with the last day of June following))~~ December 31, both dates being inclusive.

(11) "Producer-handler" means any person who acts both as a producer and as a handler with respect to blueberries. A producer-handler shall be deemed to be a producer with respect to the blueberries which he/she produces and a handler with respect to the blueberries which he/she handles, including those produced by himself/herself.

(12) "Affected area" means the state of Washington.

(13) "Sell" includes offer for sale, expose for sale, have in possession for sale, exchange, barter or trade.

(14) "Affected unit" means one pound net of blueberries.

AMENDATORY SECTION (Amending WSR 00-10-022, filed 4/24/00, effective 5/25/00)

WAC 16-550-020 Blueberry commodity board. (1) Administration. The provisions of this order and the applicable provisions of the act shall be administered and enforced by the board as the designee of the director.

(2) Board membership.

(a) The board shall consist of seven members. Six members shall be affected producers appointed or elected as provided in this ~~((article))~~ section. The director shall appoint one member of the board who is neither an affected producer nor a handler to represent the ~~((department and the public))~~ director. The position representing the director shall be a voting member.

(i) Director-appointed affected producer positions on the board shall be designated as positions two, four and six.

(ii) Elected affected producer positions on the board shall be

designated as positions one, three and five.

(iii) The position representing the director who is neither an affected producer nor a handler shall be designated as position seven.

(b) For the purpose of nomination, appointment, and election of producer members of the board, the affected area shall be the entire state of Washington.

(3) Board membership qualifications. The ~~((affected))~~ producer members of the board ~~((shall))~~ must be practical producers of blueberries and ~~((shall))~~ each must be a citizen~~((s))~~ and resident~~((s))~~ of ~~((the))~~ this state ~~((of Washington))~~, over the age of ~~((twenty-five))~~ eighteen years, ~~((each of whom is and has))~~. Each producer board member must be and have been actually engaged in producing blueberries within the state of Washington for a period of five years and has, during that time, derived a substantial portion of his/her income therefrom and ((who)) is not engaged in business, directly or indirectly, as a handler or other dealer.

(4) Term of office.

(a) The term of office for members of the board shall be three years and one-third of the membership as nearly as possible shall be elected each year.

(b) Membership positions on the board shall be designated numerically; affected producers shall have positions one through six and the member ~~((appointed by))~~ representing the director position seven.

(c) The term of office for the initial board members shall be as follows:

Positions one and two - until June 30, 1970

Positions three and four - until June 30, 1971

Positions five, six and seven - until June 30, 1972

(d) To accomplish the transition to a commodity board structure where the director appoints a majority of the board members, the names of the currently elected board members in positions two, four and six shall be forwarded to the director for appointment within thirty days of the effective date of this amended marketing order.

(5) Nomination ~~((and election))~~ of elected or director-appointed board members.

(a) Each year the director shall call ~~((for))~~ a nomination meeting for elected and/or director-appointed producer board members. ~~((Such))~~ The meeting~~(s)~~ shall be held at least thirty days in advance of the date set by the director for the election or advisory vote of board members.

(b) Notice of ~~((every such))~~ a nomination meeting shall be published in a newspaper of general circulation within the major production area not less than ten days in advance of the date of ~~((such))~~ the meeting and, in addition, written notice of every ~~((such))~~ meeting shall be given to all affected producers according to the list maintained by the ~~((director pursuant to RCW 15.65.200 of the act))~~ board pursuant to RCW 15.65.295.

(c) Nonreceipt of notice by any interested person shall not

invalidate the proceedings at ~~((such))~~ the nomination meeting.

(d) Any qualified affected producer may be nominated orally for membership on the board at ~~((such))~~ the nomination meeting(s). Nominations may also be made within five days after ~~((any such))~~ the nomination meeting by written petition filed with the director, signed by not less than five affected producers.

~~((b) At the inception of this order, nominations may be made at the issuance hearing.))~~ (e) When only one nominee is nominated by the affected producers for any position, RCW 15.65.250 shall apply.

(6) Election or advisory vote of board members.

~~(a) ((Members of the board shall be elected by secret mail ballot within the month of May))~~ An election or advisory vote shall be conducted by secret ballot under the supervision of the director within the month of May. Each affected producer shall be entitled to one vote. ~~((Affected producer))~~ Elected members of the board shall be elected by a majority of the votes cast by the affected producers. ~~((Each affected producer shall be entitled to one vote.))~~

(b) If a nominee does not receive a majority of the votes on the first ballot, a run-off election shall be held by mail in a similar manner between the two candidates for such position receiving the largest number of votes.

(c) An advisory vote shall be conducted for producer board members appointed by the director under the provisions of RCW 15.65.243. The names of the two candidates receiving the most votes in the advisory vote shall be forwarded to the director for potential appointment to the board. In the event there are only two candidates nominated for a board position, an advisory vote may not be held and the candidates' names shall be forwarded to the director for potential appointment.

(d) Notice of every election or advisory vote for board membership shall be published in a newspaper of general circulation within the major production area not less than ten days in advance of the date of ~~((such))~~ the election or advisory vote. Not less than ten days prior to every election or advisory vote for board membership, the director shall mail a ballot of the candidates to each affected producer entitled to vote whose name appears upon the list of such affected producers maintained by the ~~((director in accordance with RCW 15.65.200))~~ board pursuant to RCW 15.65.295. Any other affected producer entitled to vote may obtain a ballot by application to the director upon establishing his/her qualifications.

(e) Nonreceipt of a ballot by any affected producer shall not invalidate the election or advisory vote of any board member.

(7) Vacancies ~~((prior to election))~~.

(a) In the event of a vacancy on the board in an elected position, the remaining members shall select a qualified person to fill the unexpired term. The appointment shall be made at the board's first or second meeting after the position became vacant.

(b) In the event of a vacancy in a director-appointed position, the position shall be filled as specified in RCW



15.65.270.

(8) **Quorum.** A majority of the members shall constitute a quorum for the transaction of all business and the carrying out of all duties of the board.

(9) **Board compensation.** No member of the board shall receive any salary except that each member may be compensated in accordance with RCW 43.03.230 and shall be reimbursed for subsistence, lodging, and mileage in accordance with RCW 43.03.050 and 43.03.060, as provided for in RCW 15.65.270. The board may adopt, by resolution, provisions for reimbursement of actual travel expenses incurred by members and employees of the board in carrying out the provisions of this marketing order pursuant to RCW 15.65.270.

(10) **Powers and duties of the board.** The board shall have the following powers and duties:

(a) To administer, enforce and control the provisions of this order as the designee of the director.

(b) To elect a chairman and such other officers as the board deems advisable.

(c) To employ and discharge at its discretion such personnel, including attorneys engaged in the private practice of law subject to the approval and supervision of the attorney general, as the board determines are necessary and proper to carry out the purpose of the order and effectuate the declared policies of the act.

(d) To pay only from monies collected as assessments or advances thereon the costs arising in connection with the formulation, issuance, administration and enforcement of the order.

Such expenses and costs may be paid by check, draft or voucher in such form and in such manner and upon the signature of the person as the board may prescribe.

(e) To reimburse any applicant who has deposited with the director in order to defray the costs of formulating the order.

(f) To establish a "blueberry board marketing revolving fund" and ~~((such))~~ the fund to be deposited in a bank or banks or financial institution or institutions, approved for the deposit of state funds, in which all money received by the board except as the amount of petty cash for each day's needs, not to exceed one hundred dollars, shall be deposited each day or as often during the day as advisable.

(g) To keep or cause to be kept in accordance with accepted standards of good accounting practice, accurate records of all assessments, paid outs, moneys and other financial transactions made and done pursuant to this order. ~~((Such))~~ Records, books and accounts shall be audited at least every five years subject to procedures and methods lawfully prescribed by the state auditor. ~~((Such))~~ Books and accounts shall be closed as of the last day of each fiscal year of the state of Washington. A copy of such audit shall be delivered within thirty days after the completion thereof to the governor, the director, the state auditor and the board.

(h) To require a bond of all board members and employees of the board in a position of trust in the amount the board shall deem necessary. The premium for ~~((such))~~ a bond or bonds shall be paid

by the board from assessments collected. ~~((Such))~~ A bond shall not be necessary if any ~~((such))~~ board member or employee is covered by any blanket bond covering officials or employees of the state of Washington.

(i) To prepare a budget or budgets covering anticipated income and expenses to be incurred in carrying out the provisions of the order during each fiscal year. At least thirty days prior to the beginning of its fiscal year, the board shall prepare and submit to the director for approval its research plan, its commodity-related education and training plan, and its budget.

(j) To establish by resolution, a headquarters which shall continue as such unless and until so changed by the board. All records, books and minutes of board meetings shall be kept at such headquarters.

(k) To adopt rules ~~((and regulations))~~ of a technical or administrative nature for the operation of the board, subject to the provisions of chapter 34.04 RCW (Administrative Procedure Act).

(l) To carry out the provisions of RCW 15.65.510 covering the obtaining of information necessary to effectuate the provisions of the order and the act, along with the necessary authority and procedure for obtaining such information.

(m) To bring actions or proceedings upon joining the director as a party for specific performance, restraint, injunction or mandatory injunction against any person who violates or refuses to perform the obligations or duties imposed upon him by the act or order.

(n) To confer with and cooperate with the legally constituted authorities of other states and of the United States for the purpose of obtaining uniformity in the administration of federal and state marketing regulations, licenses, agreements or orders.

(o) To work cooperatively with other local, state, and federal agencies; universities; and national organizations for the purposes provided in this order.

(p) To enter into contracts or interagency agreements with any private or public agency, whether federal, state, or local. Personal service contracts must comply with chapter 39.29 RCW.

(q) To accept and expend or retain any gifts, bequests, contributions, or grants from private persons or private and public agencies.

(r) To enter into contracts or agreements for research in the production, irrigation, processing, transportation, marketing, use, or distribution of blueberries.

(s) To retain in emergent situations the services of private legal counsel to conduct legal actions on behalf of the commission. The retention of a private attorney is subject to review by the office of the attorney general.

(t) To engage in appropriate fund-raising activities for the purpose of supporting activities authorized by this order.

(u) To participate in international, federal, state, and local hearings, meetings, and other proceedings relating to the production, irrigation, manufacture, regulation, transportation, distribution, sale, or use of blueberries including activities authorized under RCW 42.17.190, including the reporting of those

activities to the public disclosure commission.

(v) To maintain a list of the names and addresses of affected producers that may be compiled from information used to collect assessments under the provisions of this marketing order and data on the value of each affected producer's production for a minimum three-year period pursuant to RCW 15.65.280.

(w) To maintain a list of the names and addresses of persons who handle blueberries within the affected area and data on the amount and value of the blueberries handled for a minimum three-year period by each person pursuant to RCW 15.65.280.

(x) To maintain a list of names and addresses of all affected persons who produce blueberries and the amount, by unit, of blueberries produced during the past three years pursuant to RCW 15.65.295.

(y) To maintain a list of all persons who handle blueberries and the amount of blueberries handled by each person during the past three years pursuant to RCW 15.65.295.

(z) To establish a foundation using commission funds as grant money for the purposes established in this marketing order.

(aa) To carry out any other grant of authority or duty provided designees and not specifically set forth in this section.

**(11) Procedures for board.**

(a) The board shall hold regular meetings, at least quarterly, with the time and date thereof to be fixed by resolution of the board and the meetings shall be held in accordance with chapter 42.30 RCW (Open Public Meetings Act). Notice of the time and place of regular meetings shall be published on or before January of each year in the Washington State Register. Notice of any change to the meeting schedule shall be published in the state register at least twenty days prior to the rescheduled meeting date.

(b) The board shall hold an annual meeting, at which time an annual report will be presented. The proposed budget shall be presented for discussion at the meeting. Notice of the annual meeting shall be given by the board at least ten days prior to the meeting by written notice to each producer and by regular wire news services and radio-television press.

(c) The board shall establish by resolution, the time, place and manner of calling special meetings of the board with reasonable notice to the members: Provided, That the notice to a member of any special meeting may be waived by a waiver thereof ((by each)) from that member of the board. Notice for special meetings shall be in compliance with chapter 42.30 RCW.

AMENDATORY SECTION (Amending WSR 01-05-047, filed 2/15/01, effective 3/18/01)

**WAC 16-550-040 Assessments and collections. (1) Assessments.**

**(a) The annual assessment on all varieties of blueberries**

shall be four-tenths of a cent per affected unit (pound).

(b) For the purpose of collecting assessments, the board may:

(i) Require handlers to collect producer assessments from producers whose production they handle, and remit the same to the board; or

(ii) Require the person subject to the assessment to give adequate assurance or security for its payment.

(c) Subsequent to the first sale no affected units shall be transported, carried, shipped, sold, marketed, or otherwise handled or disposed of until every due and payable assessment herein provided for has been paid and the receipt issued. The foregoing shall include all affected units shipped or sold, both inside and outside the state.

(2) Collections. Any moneys collected or received by the board pursuant to the provisions of ~~((the))~~ this order during or with respect to any season or year, may be refunded on a pro rata basis at the close of ~~((such))~~ the season or year or at the close of ~~((such))~~ a longer period as the board determines to be reasonably adapted to effectuate the declared policies of this act and the purposes of ~~((such))~~ this marketing ~~((agreement or))~~ order, to all persons from whom ~~((such))~~ moneys were collected or received or may be carried over into and used with respect to the next succeeding season, year or period whenever the board finds that the same will tend to effectuate ~~((such))~~ the policies and purposes.

(3) Penalties. Any due and payable assessment herein levied in ~~((such))~~ a specified amount as may be determined by the board pursuant to the provisions of the act and the order, shall constitute a personal debt of every person so assessed or who otherwise owes the same, and the same shall be due and payable to the board when payment is called for by it. In the event any person fails to pay the board the full amount of ~~((such))~~ the assessment or ~~((such))~~ other sum on or before the date due, the board may, and is hereby authorized, to add to ~~((such))~~ the unpaid assessment or sum an amount not exceeding ten percent of the ~~((same))~~ unpaid assessment to defray the cost of enforcing the collecting of ~~((the same))~~ it. In the event of failure of ~~((such))~~ a person or persons to pay any ~~((such))~~ due and payable assessment or other ~~((such))~~ sum, the board may bring a civil action against ~~((such))~~ the person or persons in a state court of competent jurisdiction for the collection thereof, together with the above specified ten percent ~~((thereon))~~, and ~~((such))~~ the action shall be tried and judgment rendered as in any other cause of action for debt due and payable.

AMENDATORY SECTION (Amending Order 1116, filed 5/14/69, effective 6/15/69)

WAC 16-550-060 Termination of the order. (~~The order shall be terminated if the director finds that fifty-one percent by numbers and fifty-one percent by volume of production of the affected producers favor or assent such dissolution. The director may ascertain without compliance with RCW 15.65.050 through 15.65.130 of the act whether such termination is so assented to or favored whenever twenty percent by numbers or twenty percent by volume of production of the affected producers file written application with him for such termination. The termination shall not, however, become effective until the expiration of the marketing season.)) Termination shall be accomplished pursuant to RCW 15.65.183 through 15.65.193.~~

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 16-550-030

Marketing order purposes.